BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JERRY M. MCINTOSH Claimant	)	
VS.	)	Docket No. 265,500
CITY OF WICHITA Self-Insured Respondent	)	

ORDER

Claimant requested review of the November 6, 2002, Award of Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on May 16, 2003. Stacy Parkinson of Olathe, Kansas, was appointed Board Member Pro Tem to participate in the hearing and to decide this review.

APPEARANCES

Robert R. Lee of Wichita, Kansas, appeared for the claimant. Edward D. Heath Jr. of Wichita, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found claimant's injuries, which occurred while he was playing tennis, did not arise out of his employment, therefore, an award of compensation was denied.

The claimant argues that, although playing tennis was not a job requirement, such activity was encouraged and benefitted the respondent because it developed camaraderie among the crew members as well as maintained physical fitness. Consequently, the claimant argues the accident arose out of the employment and benefits should be awarded.

Respondent argues the injury playing tennis occurred during claimant's discretionary time away from the fire station and claimant knew that injuries during this time period were considered personal and not work-related.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board affirms the ALJ's determination the accidental injury did not arise out of claimant's employment.

The facts are essentially undisputed. Claimant, a firefighter with the City of Wichita for 30 years, fell on April 4, 2001, while playing tennis with other members of the fire department, breaking his right arm. This accident resulted in surgery on his right arm and elbow on April 5, 2001.

Claimant worked a 24-hour-on/48-hour-off shift with respondent fire department. Between 8 a.m. and 5 p.m. is when claimant would perform scheduled work, which included fire inspections, a physical education program in the morning, drill cycles, EMT training, fire drills, fire training, paperwork, station clean-up and maintenance on the equipment and building. Of course, the scheduled work was subject to interruption when claimant was responding to fire or medical alarms.

The City of Wichita Fire Department had a physical fitness policy. This administrative policy designated a specific daily physical fitness exercise period from 8 a.m. to 9 a.m. The administrative physical fitness policy included cardiovascular exercises, weight training, walking, running and biking activities, and cool-down periods. The administrative physical fitness policy did not discuss or include playing tennis.

Claimant regularly ate supper at approximately 5 p.m while on duty with the fire department. After 6 p.m., the department had what they called discretionary time when the firefighters could do whatever they desired, so long as they remained in contact with the station in order to respond to alarms. Claimant and several other members of his firefighting crew, one to two days a week, would go to a local tennis court during their discretionary time period and play tennis. This tennis activity was purely on a volunteer basis and was not, in any way, required by the respondent.

And claimant agreed that he had been advised by his battalion chief that the city policy was that if an injury occurred while playing tennis on discretionary time it would be covered by claimant's personal health insurance rather than as a workers compensation claim. But claimant correctly assumed it would be up to a Judge to make that determination.

Claimant acknowledged that playing tennis was a voluntary activity, although he did testify that the activity was performed at least, in part, to help keep physically fit, as was

required of all firefighters. When claimant suffered the injury, he went to St. Joseph Medical Center and received the initial treatment in the emergency room. He advised them his treatment was to be billed to his personal health and accidental injury insurance, as any injuries suffered while playing tennis were, as acknowledged by claimant, "the personal responsibility of the firefighter" according to city policy.

In proceedings under the Workers Compensation Act, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[1]

K.S.A. 44-508(f) states, in part:

> The words, "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to employees while engaged in recreational or social events under circumstances where the employee was under no duty to attend and where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer.

As previously noted, claimant agreed that playing tennis was a voluntary recreational activity performed during his discretionary time period when he was free to participate in any activity of his choice. And claimant was under no requirement or duty to go play tennis. The statute precludes a determination claimant's injuries arose out of his employment under the facts of this claim.

Moreover, 2 *Larson's Workers' Compensation Law*, § 22.01 (2000) at 22-2, lists three factors to determine whether recreational and social activities fall within the course of an employee's employment.

One factor is whether the employer expressly or impliedly requires participation in the activity or brings the activity within the orbit of employment by making the activity part of the service of employment. On several occasions, firefighters have been injured while playing volleyball during their work shifts. Courts have found these activities to be regular incidents and conditions of employment, where volleyball is a recognized activity at the fire department and participation by any employee was acquiesced in by their supervisors. In *Flower v. City of Junction City*,[2] the Board was asked to consider whether the claimant, a firefighter for the City of Junction City, suffered accidental injury arising out of his employment when he was injured playing volleyball. In *Flower*, the City of Junction City had a daily schedule, including an entry at 1300 hours for "physical fitness." Claimant's injury occurred during the scheduled physical fitness period. In addition, claimant testified he had been discussing a personal problem with the acting captain, which related to one

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[1] *See* K.S.A. 44-501 and K.S.A. 44-508(g).

[2] *Flower v. City of Junction City*, No. 189,684, 1998 WL 100183 (Kan. WCAB Feb. 19, 1998).

of the firefighters' attitudes at work. He decided to use the volleyball game as an opportunity to talk to that particular firefighter about the ongoing problems.

In this instance, the activity occurred while claimant was involved in a discretionary period activity, which did not take place during the normally scheduled physical fitness period. And the activity was not required, participation was entirely voluntary.

A second factor listed by *Larson's* in determining whether a recreational activity is within the course of employment is whether the employer derives a benefit from the employee's participation beyond the benefits of the employee's health and morale. The Board acknowledges that allowing employees to engage in physical fitness activities benefits the department by having firefighters better prepared to respond to emergency situations which require both physical fitness and stamina. However, in this instance, again the department had set aside a specific physical fitness period. In addition, the department had, in effect, a physical fitness activity policy which specified the types of activities the department recommended for physical fitness training. Tennis was not included in that physical fitness administrative policy.

A final factor in determining whether recreational activities are within the course of employment is whether they occur on the employer's premises during a lunch or recreation period as a regular incident of the employment. According to *Larson's*, "recreational injuries during the noon hour on the premises have been held compensable in the majority of cases."[3] In this instance, claimant was on duty, but was injured while playing tennis away from his employer's premises at a time other than a regularly scheduled time for physical fitness activities. Claimant was instead injured during the department's discretionary time, when the firefighters are free to "do their own thing."

Finally, claimant acknowledged during cross-examination that he knew that tennis was not considered to be within the physical fitness policy and that injuries occurring during this discretionary time while playing tennis would be "the personal responsibility of the firefighter."

The Board finds that claimant's injuries suffered while playing tennis during the discretionary time away from the department's premises did not constitute accidental injuries arising out of his employment with respondent. The ALJ's Award denying benefits is affirmed.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated November 6, 2002, is affirmed.

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[3] 2 *Larson's Workers' Compensation Law*, § 22.03 (2000) at 22-5.

IT IS SO ORDERED.

Dated this _____ day of June 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
Edward D. Heath, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director